In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1433

THE FLINTKOTE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying petitioner's motion for summary judgment (Pet. App. A5-A14) is reported at 47 F.R.D. 322. The opinion of the district court granting the government's motion for summary judgment (Pet. App. A15) is not reported. The opinion of the court of appeals (Pet. App. A1-A4) is reported at 435 F. 2d 556.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for a writ of certiorari

was filed on March 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the one-year limitation period of Article 3-A of the New York Lien Law bars a suit by the United States to enforce a claim under that statute.

STATUTE INVOLVED

The pertinent provisions of Article 3-A of the New York Lien Law (Lien Law, McKinney's Consol. Laws of N. Y., Article 3A) are set forth in the Appendix, *infra*, pp. 7-12).

STATEMENT

In 1964, Gateway Construction Company, a general contractor building an apartment house in Yonkers, New York, subcontracted some installation work to Westchester Wallboard Corporation. Petitioner agreed to finance Westchester's payroll and material costs in carrying out the subcontract. Westchester, with Gateway's consent, assigned its rights under the Gateway contract to petitioner. Under the assignment petitioner was to apply the monies it received to Westchester's obligations, and to remit any excess to Westchester (Pet. App. A3, A5-A6).

Westchester performed its contract with Gateway, but failed to pay the government certain payroll taxes owed by virtue of the Gateway project, resulting in tax assessments by the government against Westchester. Although Westchester completed its work on

the project in 1964, Gateway did not pay petitioner the full amounts owing under the assigned contract. Westchester subsequently became insolvent. In 1967, petitioner and Gateway compromised their differences. Gateway agreed to pay a total of $30,000 in satisfaction of petitioner's contract claim, of which sum $10,000 was to be held in escrow until the rights of the United States were determined (Pet. App. A3-A4, A-6-A7).

Petitioner then instituted this suit in a state court, seeking a declaratory judgment that the government's tax claims against Westchester did not attach to the escrowed funds. The government removed the action to the federal district court and asserted by way of counterclaim a right to the funds under Article 3A of the New York Lien Law. Petitioner moved for summary judgment and sought dismissal of the government's counterclaim on the ground that it was barred by the one-year limitations period prescribed in Section 77(2) of the state Lien Law (Appendix, *infra*, p. 12). The court concluded that Section 77(2) imposed only "a procedural statute of limitations" which did not bar the government's counterclaim, "since the United States cannot be barred by a state-imposed procedural limitation * * *" (Pet. App. A14, A10).[1] Since this was petitioner's only defense to the counterclaim, the

[1] Because of lack of proof of whether the facts would in any event bring the Section 77(2) restriction on commencement of suit into play, the court concluded that "an essential question of fact is in dispute" and accordingly denied the summary judgment motion (Pet. App. A9). The government subsequently conceded that its counterclaim did not meet the one-year requirement of Section 77(2) (Pet. 4), thus eliminating the only factual issue.

government moved for summary judgment, and the court granted this motion (Pet. App. A15). The court of appeals affirmed per curiam (Pet. App. A1-A4).

ARGUMENT

Petitioner's single contention is that the courts below incorrectly construed the limitations provision of Section 77(2) of the New York Lien Law.

This question of state law does not warrant review by this Court and, in any event, was correctly decided by the courts below. The New York Lien Law creates a trust of the funds payable in connection with construction contracts for improving real estate (Section 70, Appendix, *infra,* pp. 7-10), the purpose of which is to provide payment of obligations, including payroll taxes, incurred in performing the contract (Sections 71 and 77(8), Appendix, *infra,* pp. 10-12). Section 77(2) directs that no action to enforce a trust created by the statute "shall be maintainable if commenced more than one year after the completion of * * *" the construction to which the statute applies. These provisions of the Lien Law and its legislative purpose and history (see 1959 N.Y. Law Rev. Comm. Rep., 185-227; 1942 N.Y. Law Rev. Comm. Rep., 11-12, Legis. Doc. No. 65(H)) plainly indicate that Section 77(2) is only a procedural statute of limitations, as held below (see Pet. App. A10-A14), and not a condition precedent to the enforcement of the statutory trust, as petitioner contends. Moreover, the decision below accords with the only state decision closely in point. *Davis & Warshow, Inc.* v. *S. Iser, Inc.,* 30 Misc. 2d 528,

537-540. See, also, *Terns* v. *Whispell,* 227 F. Supp. 498 (S.D. N.Y.).

Since, as petitioner concedes (Pet. 5), a state procedural limitation is ineffectual against claims asserted by the United States (*United States* v. *Summerlin,* 310 U.S. 414, 416, and cases there cited), no federal question is here presented for review by this Court.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

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[2] *Custer* v. *McCutcheon,* 283 U.S. 514, on which petitioner relies (Pet. 6), is inapposite. In that case the Court concluded that Congress intended state rules to govern the question there involved, concerning limitations on judgment execution actions. By contrast, Congress has prescribed the applicable limitations provision for federal tax liens in Section 6502(a), Internal Revenue Code of 1954 (26 U.S.C.) (see Pet. App. A10).

APPENDIX

Lien Law, McKinney's Consol. Laws of N.Y. Ann.:

§ 70. *Definition of trusts*

1. The funds described in this section received by an owner for or in connection with an improvement of real property in this state, or received by a contractor under or in connection with a contract for an improvement of real property or a contract for a public improvement in this state, or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter.

For the purposes of this section: (a) any right to receive payment at a future time shall be deemed a right of action therefor and an asset of the trust even though it is contingent upon performance or upon some other event, but the fact that the right is a trust asset does not enlarge the right or excuse any performance or condition upon which it depends; (b) "contract" and "subcontract" shall include any modification of the contract or subcontract to which reference is made; and (c) funds due or earned under a contract or subcontract shall include any funds payable to the contractor or subcontractor in addition to the contract price by reason of any transaction,

event or circumstance in the making or in the performance of the contract or subcontract.

2. The funds received by an owner and the rights of action with respect thereto, for or in connection with each improvement, shall be a separate trust and the owner shall be the trustee thereof. The funds received by a contractor or subcontractor and the rights of action with respect thereto, under or in connection with each contract or subcontract, shall be a separate trust and the contractor or subcontractor shall be the trustee thereof.

3. Every such trust shall commence at the time when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust. The trust of which the owner is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time during the improvement has been paid or discharged, or until all such assets have been applied for the purposes of the trust. The trust of which a contractor or subcontractor is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time prior to the completion of the contract or subcontract has been paid or discharged, or until all such assets have been applied for the purposes of the trust. Upon termination of the trust by payment or discharge of all the trust claims, the beneficial interest in any remaining assets shall vest in the owner, contractor or subcontractor, as the case may be.

4. The trusts described in this section shall arise

whether or not a covenant declaring or acknowledging the trust, as required in article two of this chapter, has been executed.

* * * *

6. The assets of the trust of which a contractor is trustee are the funds received by him and his rights of action for payment thereof

(a) under the contract for the improvement of real property or the public improvement;

(b) under an assignment of funds due or earned or to become due or earned under the contract;

(c) as proceeds of any insurance payable because of destruction of the improvement of real property or public improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the contractor for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets.

7. The assets of the trust of which a subcontractor is trustee are the funds received by him and his rights of action for payment thereof

(a) under the subcontract;

(b) under an assignment or order for the payment of moneys due or earned or to become due or earned under the subcontract;

(c) as proceeds of any insurance payable because of the destruction of the improvement of real property or public improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the subcontractor for pre-

miums paid by him out of funds other than trust funds shall not be deemed part of the trust assets.

§ 71. *Purpose of the trust; "trust claims"; "beneficiaries"*

1. The trust assets of which an owner is trustee under subdivisions five(a) to five(f), inclusive, of section seventy of this chapter shall be held and applied for payment of the cost of improvement. The trust assets of which an owner is trustee under subdivision five(g) of section seventy of this chapter shall be held and applied for payment of the cost of improvement and, in addition, for the purposes of the further trust provided in section seventy-one-a of this chapter.

2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property or public improvement and incurred in the performance of his contract or subcontract, as the case may be:

(a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;

(b) payment of the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement;

(c) payment of taxes and unemployment insur-

ance and other contributions due by reason of the employment out of which such claims arose;

(d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

(e) payment of premiums on a surety bond or bonds filed and premiums on insurance accrued during the making of the improvement or public improvement.

3. (a) With respect to the trust of which an owner is trustee, "trust claims" means claims of contractors, subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, for which the owner is obligated, and also means any obligation of the owner incurred in connection with the improvement for a payment or expenditure defined as cost of improvement.

(b) With respect to the trusts of which a contractor or subcontractor is trustee, "trust claims" means claims arising at any time for payments for which the trustee is authorized to use trust funds as provided in subdivision two of this section.

* * * *

§ 77. *Action to enforce trust*

1. A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary

of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee. In any such action, except as otherwise provided in this article, the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action.

2. Such action may be maintained at any time during the improvement of real property or public improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. No such action shall be maintainable if commenced more than one year after the completion of such improvement, except an action by the trustee for final settlement of his accounts and for his discharge.

* * * *

8. Subject to subdivisions three and four of this section, in any distribution of trust assets pursuant to order or judgment in an action to enforce a trust, the following classes of trust claims shall have preference, in the order named: (a) trust claims for taxes and for unemployment insurance and other contributions, due by reason of employments, and for amounts of taxes withheld or required to be withheld; ***

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